Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

ALLEN B. GOTTLIEB &
LAW OFFICES OF GOTTLIEB & ASSOCIATES,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ALLEN B. GOTTLIEB
Pro Se
20533 Biscayne Boulevard
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305-937-0012

QUESTIONS PRESENTED

1- Whether the SEC properly calculated damages pursuant to Section 20(d) of the Securities Act of 1933, 15 U.S.C. § 77t(d) and 15 U.S.C. § 78u(d)(3)(B)(i) amounting to punitive damages because all funds had been previously disgorged..
2- Whether the complaint should be dismissed with prejudice because the lower court abused its discretion enlarging plaintiff's time to serve appellant under FRCP 4(m); thereafter authorizing plaintiff to serve appellant internationally under FRCP 4(f) without imposing any time limit; failing to dismiss the case after plaintiff did not serve appellant until more than 22 months after the statute of limitations had expired; and denying appellant's pretrial request for discovery with respect to plaintiff's failure to exercise due diligence in service.

PARTIES

The parties to the proceeding below were:

Petitioners: Allen B. Gottlieb and Gottlieb and Associates, P.C. Petitioners were aligned as defendants/appellants below.

Respondent: Securities and Exchange Commission. Respondent was aligned as plaintiff/appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Allen B. Gottlieb, individually and on behalf of Law Offices of Gottlieb & Associates, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals upon defendant Gottlieb's request for a re-hearing en banc is annexed as Exhibit 1. The opinion of the Court of Appeals is annexed as Exhibit 2. The trial court's finds of fact and conclusions of law finding Gottlieb liable is annexed as Exhibit 3.

JURISDICTION

The Court of Appeals affirmed the district court's findings of liability. The Court of Appeals denied Gottlieb's timely filed petition for en banc rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

The district court had jurisdiction over this action pursuant to Sections 20(d)(1) and 22(a) of the Securities Act [15 U.S.C. §§ 77t(d)(1), 77v(a)] and Sections 21(d), 21(e) and 27 of the Exchange Act [14 U.S.C. §§ 78u(d), 78u(e) and 78aa].

The Appellate Court had subject matter jurisdiction over the instant appeal pursuant to 15 U.S.C. § 77v. On February 13, 2003, defendant Allen Gottlieb filed a timely notice of appeal from the Court's Decision entered January 23, 2003. A 305.[1]

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[1] Appendices are referred to as follows: Appellant's Appeal Brief as "Br. __," Appendix as "A __," Appellant's Special Appendix as "SPA __," the SEC's opposition brief as "Opp. __,"and the SEC's Supplemental Appendix as "SA __.

CONSTITUTIONAL PROVISIONS AT ISSUE

By allowing the SEC to commit such egregious fraud, and by extending the statute of limitations without end, the District Court and Court of Appeals have violated Gottlieb's civil rights, his right to rely upon the statute of limitations, his right to a fair trial, his right to present evidence and his right to a full and proper damage calculation. Moreover, Gottlieb settled a related case ten years ago and repaid all monies received in connection with this transaction such that there is nothing to disgorge to the SEC. Gottlieb's right to a proper credit for the prior settlement has been violated when no judicial notice was taken of the settlement between Gottlieb and Longo ten years earlier.

STATUTORY PROVISIONS AT ISSUE

Sections 20(d)(1) and 22(a) of the Securities Act 15 U.S.C. §§ 77t(d)(1), 77v(a);

Sections 21(d), 21(e) and 27 of the Exchange Act [14 U.S.C. §§ 78u(d), 78u(e) and 78aa]

Federal Rule of Civil Procedure 4(m)

Federal Rule of Civil Procedure 4(f).

STATEMENT OF THE CASE

This is a securities enforcement proceeding brought pursuant to Sections 20(d)(1) and 22(a) of the Securities Act [15 U.S.C. §§ 77t(d)(1), 77v(a)] and Sections 21(d), 21(e) and 27 of the Exchange Act [14 U.S.C. §§ 78u(d), 78u(e) and 78aa] in that the SEC alleged that appellant Allen Gottlieb, among fifteen others, recklessly or knowingly engaged in an unlawful scheme to mislead and defraud investors in connection with an investment program. During the course of time, all Defendants have accepted responsibility with the exception of Gottlieb and Gottlieb's client, who disgorged all pecuniary gains ten years earlier in

a Court Approved Settlement in that same lower court, before this same judge. Gottlieb and Lagonia have a right to rely upon that court - approved settlement and for the court to take Judicial Notice of that settlement. To replay these same issues (ten years later by the SEC who was fully aware of the case and settlement between Longo and those Fifteen Defendants), in a new case is akin to "Double Jeopardy", a violation of Gottlieb's Civil Rights.

Lagonia was a mere broker and Gottlieb his attorney were not involved in the securities fraud, or any violations of the securities laws as they were contractually obligated to provide ONLY an Escrow Bank, which they did. At trial, the lower court released Gottlieb's client, but somehow held Gottlieb responsible, we believe as a "mere spite" for not being able to attend the trial.

At the last minute, Gottlieb was unable to attend the trial in person due to the illness of his wife and his child who suffers with Downs Syndrome, but was represented ineffectively by counsel. The court awarded unfounded staggering damages and held Gottlieb responsible. The Court filed its Decision on the record, and final judgment in favor of the SEC was entered on January 23, 2003. The instant appeal followed. A 305, 306; SPA 1-34.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

ISSUE 1

THE COURT SHOULD GRANT CERTIORARI AND DECIDE WHETHER THE SEC'S FRAUDULENT CONDUCT WARRANTS REVERSAL OF THE DISTRICT COURT'S DECISION.

ISSUE TWO

THE COURT SHOULD GRANT CERTIORARI TO RECTIFY THE ABUSE OF DISCRETION BY THE

DISTRICT COURT REGARDING SERVICE AND STATUTE OF LIMITATIONS

INTRODUCTION

Allen Gottlieb, the defendant in this matter, requests Writ of Certiorari be granted based upon a "Fraud on the Court" perpetrated by the Securities and Exchange Commission, "SEC". In this matter, the SEC has prevented the defendant Gottlieb from fairly presenting the facts of the case and a truthful defense by presenting the court with such egregious misrepresentations, outright lies and fabrications that they have served to undermined the integrity of the judicial process, prevented impartial adjudication, massively abused their powers and continue to fraudulently misrepresent the facts associated with the case and its alleged damages.

Therefore, Gottlieb requests a Writ of Certiorari based not upon a mere manifest injustice, nor even upon a clear error of law, but upon the clear and convincing evidence of the SEC's intentionally perpetrated and executed "Fraud upon the Court".

I. THE SEC IMPROPERLY CALCULATED DAMAGES

This fraud was so virulent in its inception and continued to a point when the SEC had an opportunity to correct their lies, but instead continued their abuse of power and by such act have served to deny and obscure the truth from the lower court. Unfortunately, this fraud was then "rubber stamped" by the Court of Appeals in such a shameful, prejudicial Summary Order that the Court of Appeals demanded the summary order never find its way into the Federal Reporter, nor used as precedential authority. The Court took this action to prevent their scandalous and

shameful summary order to be printed as it would have shocked the entire legal community, having gone against the weight of evidence and created brand New Law, serving as the Executive, Legislative and Judicial branches of the Government all rolled into one. It is incumbent upon this Honorable Court to grant a Writ of Certiorari so that the underpinnings of the summary order be exposed for its baseless and fraudulent nature and not be permitted to permeate the judicial process and become the New Law.

The SEC starts their fraud by coining the phrase "Global Figure" and appending a wild and unsubstantiated and fictional $1,775,000, which amount has no relationship to the evidence as presented in this matter.

The fraud that the SEC has attempted to perpetrate manifests itself in several ways. First, the SEC fabricates figures without substantiation in its demand for damages. Second, the SEC was permitted to prevail in the lower court despite the court's assault on the statute of limitations. The SEC demands that the defendant, Gottlieb disgorge himself of **$1,775,000**. The SEC knows full well that Gottlieb only received legal fees of $396,000 and some expenses. Yet, fully cognizant of that fact, and the fact that Gottlieb returned the $396,000 plus expenses plus interest, in this very same lower court, before this very same Judge, in a Court Approved Settlement in 1994, the SEC pushes forward and instead of correcting the error, it perpetuates the lie and causes the fraud upon the court. The bottom line is that disgorgement already occurred ten years ago! This matter should have ended ten years ago!

After ten years of pursuing Gottlieb on this matter, utilizing government resources the SEC had to come up with something, so they just resorted to outright lies and intentionally defrauded the court who relied upon their honesty. The Court automatically believed the SEC, as demonstrated by the court's embrace of the SEC's assertions

without question, without investigation, and without even an elementary analysis, which would have immediately revealed the SEC fraud. This intentional abuse of the SEC's Agency Power is how the SEC persuades with their outright fraudulent lies to the court, when the court expects no less than clean hands from the SEC. The sole purpose for these fraudulent and deceptive transgressions is to make an honest Court a Co-conspirator in the SEC perpetrated fraud. The Court readily accepts the SEC's statement. But, in this case, instead of being honest, the SEC has taken advantage of the Court with their venomous lies and fraudulent statements. What more can one say when all this is brought to the attention of the Court of Appeals, they just rubber stamped the whole frustrating and fraudulent mess without comment, without inquiry and without any analysis, hoping not to draw attention to it and hoping that the minimal chance that the Supreme Court will not grant a Writ of Certiorari works in their favor. However, a manifest injustice has occurred here, not just upon Gottlieb, it reflects heavily upon how an Agency of the federal government can break the law and get away with it, because the court did not take a minute to analyze the fraudulent calculations. It is incumbent upon this Honorable Court to correct this flagrant abuse and fraud on the Court.

"The remedy of Disgorgement is designed both to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws" SEC v. Phoenix Telecom, 231 F Supp.2d 1223, 1225 (N.D. Ga.2001) citing SEC v. Blatt, 583 F.2d1325, 1335 (5th Cir.1978).

But when the "wrongdoer" has already disgorged gained sums, the penalty is excessive and becomes punitive, contrary to the purpose of disgorgement. "Because disgorgement is remedial and not punitive the court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his

wrongdoing" Id. This is not a question of miscalculations, this is a calculated fraud on the court as Gottlieb retained nothing and has no pecuniary gain and the SEC is fully aware of that fact.

The lower court said to the SEC to submit the monetary award they think is proper. The SEC submitted the Order to the judge and it was summarily accepted. This is simply unbelievable, and untenable as the same judge approved and signed the settlement ten years ago whereby Gottlieb disgorged any pecuniary gain. Despite its familiarity with the earlier settlement, presided over by the same judge, the lower court ignored the most crucial fact, that ALL money received by Gottlieb was already returned ten years ago in the same lower court, before the same judge who approved that settlement. In this instance, disgorgement in the form of a court approved settlement occurred ten years ago by the return of all pecuniary gains. The gains have been returned and therefore cannot be returned again.

At one point in their calculations, the SEC admitted that these monies ought not be included in the gross amount of Gottlieb's "pecuniary gain" when calculating civil penalties. Opp. 38, n.11. The District Court similarly acknowledged that monies were received by other entities but not by Gottlieb, yet failed to deduct these figures when it awarded damages. SPA 3, SPA 8.

As part of the global number the SEC leveled against Gottlieb, $396,000 was also returned in the same court approved settlement ten years ago by Gottlieb's Client, Ken Lagonia. The SEC included this same $396,000 in its damages calculations. This money had been returned to Longo by Lagonia but somehow the SEC seeks to have this money - which was Lagonia's and returned by Lagonia - to be disgorged from Gottlieb.

The lower court held that Lagonia was not liable to Longo, yet the lower court included money returned by

Lagonia in the disgorgement figures it seeks now from Gottlieb. Lagonia's money - returned to Longo - cannot be disgorged from Gottlieb simply because Lagonia was not found liable by the lower court. The SEC is seeking recovery from the only remaining defendant, Gottlieb.

When presented to the SEC that Lagonia's money could not be disgorged from Gottlieb, the SEC only confirmed its "oversights" and submitted its original proposed order. Therefore, having been given every opportunity to correct the "oversight", one can only conclude that the SEC is intentionally acting to mislead the Court.

Thus, it must be concluded from these affirmation actions, that the SEC clearly committed an intentional fraud on the Court. Any reasonable review reveals that such gross miscalculations with the SEC's full knowledge of all these facts resorted to outright fraud on the court.

These fraudulent actions are even more egregious when looked at individually. The SEC compounded their fraud again by including the Trustee Bank Fees received by El-Hage [in its penalty against Gottlieb], despite the SEC's own admission that Gottlieb had never received these funds. The SEC compounded their fraud even more when they included $396,000 plus interest which was also returned 10 years ago, by Gottlieb's client, Mr. Lagonia, as part of the same lower court approved settlement. The Lower Court found that Mr. Lagonia had no responsibility and nothing to disgorge. (A decision with which I agree, however, it fell quite short, as how can you hold an attorney liable for following the orders of his client and not hold the client responsible?)

By beginning their calculations with a knowingly fraudulent $1,775,000 figure, the SEC has greatly prejudiced Gottlieb. That unfounded figure has no relationship to any monies received by Gottlieb. Opp. 38, n.11; SPA 3. The SEC also characterized this figure as "the amount the record

shows Gottlieb's schemes took in" but offered no support for this declaration, nor where or how the record supported this untenable figure. Opp. 38, n. 11.

The SEC tries to justify their fraudulent figure by indicating that $1,275,000 is from the Longo transaction and $500,000 is from the Myers and Schwartz transaction, monies that Gottlieb specifically and demonstrably he never received. Opp. 38, n.11.

Gottlieb's role was quite limited. Gottlieb was engaged as Lagonia's attorney and had no relationship with Stewart. Gottlieb himself only received payment of $396,667 for his services, which was returned as part of the court approved settlement ten years ago, along with Lagonia's money, and interest. Gottlieb was not responsible for Stewart's transactions and should not be made to suffer the total of Stewart's "schemes." The bottom lines is that Gottlieb had no pecuniary gain as any and all money received was returned 10 years ago!. The District Court separately directed disgorgement of $853,000 (before interest) from other entities including Finanzurich and Americredit. SPA 7. If, as the District Court found, these entities received monies to be disgorged, it was blatant error to simultaneously hold Gottlieb accountable for the return of these funds that by definition Gottlieb could not – and in fact did not – receive. To compound the confusion, no explanation of how these numbers impact the "global" figure was set forth by the SEC. If the SEC were forced to specify and itemize the numbers, it would be plain to see that Gottlieb had no pecuniary gain and had nothing to disgorge.

When the SEC was given the opportunity to correct their calculations as set forth in the final judgment they should have put forth the actual numbers, $956,923.02, with a offset of $811,076.08 for monies returned by Gottlieb and Lagonia, along with El Hage's $396,667, the difference of those figures becomes a **negative number**! (The negative

number included interest from the court-approved settlement.) Instead, of facing up to the problem the SEC compounded the fraud on the Court by proposed damages in the millions of dollars.

Another aspect of the damages assessed against Gottlieb arose from the Myers and Schwartz transaction with Stewart. The SEC again resorted to underhanded and disingenuous tactics knowing full well that Gottlieb never received any money from Myers and Schwartz. Gottlieb Appeal Brief and Reply Brief amply demonstrate that there is no justification for assessing damages against Gottlieb arising from that transaction.

Gottlieb reiterated in deposition testimony and on appeal that he never interacted with Myers and Schwartz, was never retained by them, and did no work for them. App. Br. 28-30; Reply 28-29; A. 149-152, 199, 203, 204, 206. He certainly never received any money from them. App. Br. 28-30; Reply 28-29; A. 149-152, 199, 203, 204, 206.

As to Myers and Schwartz, they testified they never talked to, communicated with, or met Gottlieb. Myers and Schwartz transferred $500,000 to Stewart's company, HD Inc. A198. The district court oddly concluded that $475,000 of Myers and Schwartz's money somehow went to Gottlieb's account. SPA 23. However, the record contains no evidence that this money was transferred from Stewart or any of his company's accounts to Gottlieb. The only evidence the SEC submitted was a bank statement containing an erroneous transfer – but no evidence of a wiring fee, or wiring instructions or an official indication of where the money came from, or went to. This mistaken transfer from an unknown source to Gottlieb's law office account was for $325,000 - substantially less than the $500,000 the Court included in their penalty of Gottlieb. Moreover, there was no evidence presented, such as bank statements from HD, Inc. or any of Stewart's companies that any money was ever

transferred from Stewart or his company's accounts to anyone, anywhere, at any time and for all that evidenced by the SEC those funds could still be in Stewart's account. The SEC failed to establish any connection between Myers' and Schwartz's money - delivered to Stewart or his companies - and Gottlieb. The SEC offered only a bank statement from Gottlieb's attorney trust account, which included a deposit by means of a wire transfer - no evidence of the source of the transfer which was obviously a bank error - that was immediately returned to the sending bank. No bank instructions were furnished. No corroborating evidence was presented. A303. There was no evidence that the entry even came from Stewart or any of his companies, and no evidence that any of Myers' and Schwartz's money went from HD, Inc. to Gottlieb's account. Additionally, the court held that Gottlieb received $475,000, when the only evidence offered was an erroneous entry in the amount of $325,000. A303.

Nonetheless, without basis in law or fact the District Court erroneously concluded that Gottlieb somehow received $475,000 from Stewart's transactions with Myers and Schwartz. SPA 23. The $475,000 figure is illustrative of the punitive nature of the damage calculations in this matter. The District Court indefensibly included this figure into its decision without any foundation in the record. SPA 23. The evidence presented by the SEC bore no relation to $475,000.

Since the SEC investigated the Meyers and Schwartz matter and found no factual evidence to link Gottlieb to Meyers and Schwartz's, or to their money, the matter should never have been entertained in the first instance. But the SEC would rather invent another fraudulent story, mislead the court, and in this manner the SEC has again instituted another fraud upon the Court.

Notwithstanding the erroneous findings of the District Court that $475,000 was received by Gottlieb when it was not, the District Court assessed Gottlieb (and the

Court of Appeals affirmed) the entire amount that Myers and Schwartz conveyed to Stewart – $500,000, not the $475,000 mystery sum, nor the $325,000 which the SEC argued was evidenced by a bank statement.

Another aspect of the SEC's judgment that is never fully explained is the interest calculations. As a preliminary matter, interest calculations improperly included the above described sums, so any interest calculation must be correspondingly reduced. Secondarily, the interest calculations more than double the amount of damages and appear (but without an actual accounting, it is impossible to verify) to be excessive and punitive. Finally, Gottlieb's gain from Stewart's transactions amounted to nothing, even with accrued interest. Without any pecuniary gain their can be no disgorgement . . . as there is nothing to disgorge!

The SEC's suggestion that Gottlieb did not dispute the amount of the award at the District Court level was flawed. Opp. 38, n 11. When the District Court set forth its final decision, Gottlieb's counsel renewed all objections on the record. SPA 34. Thereafter, the SEC submitted a proposed judgment to the District Court and the proper vehicle to dispute the amount of the award was to appeal it, as well as the underlying basis for the award, which is exactly what Gottlieb did. Contrary to the SEC's implications, Gottlieb properly preserved his right to appeal the SEC's request for damages. Opp. 38, n 11.

Another aspect of the District Court's assessment of damages must be set aside to prevent manifest injustice. The SEC sought civil penalties pursuant to Section 20(d) of the Securities Act of 1933, 15 U.S.C. § 77t(d). This statute provides that natural persons who violate federal securities laws are subject to "tiered" penalties, or the gross amount of pecuniary gain. 15 U.S.C. § 78u(d)(3)(B)(i) The District Court assessed Gottlieb a civil monetary penalty of $878,333, presumably based upon the District Court's

calculation of Gottlieb's gross amount of pecuniary gain. SPA 5. However, Gottlieb received **NO PECUNIARY GAIN** from either transaction. The actual basis for this figure is not provided and no explanation was submitted by either the SEC or the District Court, despite the issue being raised by Gottlieb. App. Br. 8, n.2.

The District Court based the civil penalty on 15 US 77t(d) which permitted the penalty to reflect the "gross amount of pecuniary gain". As evidenced throughout this matter, Gottlieb had no pecuniary gain from which to derive a civil penalty. He settled Longo's civil claim and dropped his civil claims against Longo and Feldman almost ten years ago and received no other funds. Gottlieb's "gross amount of pecuniary gain" is zero. His civil penalty should properly reflect the absence of pecuniary gain, "zero". Although Gottlieb gained nothing from the events for which the SEC is so single-mindedly pursuing him, the SEC has transformed the purported disgorgement into an actual penalty and compounded the injustice with baseless civil penalties. It was clear error for the District Court to permit these fraudulent calculations to be perpetrated upon Gottlieb and the injustice to stand in its final judgment. As set forth above, Gottlieb has demonstrated – and the SEC in part concedes – that he did not receive the monies contained in the award.

II. THE COURT SHOULD GRANT CERTIORARI TO RECTIFY THE ABUSE OF DISCRETION BY THE DISTRICT COURT REGARDING SERVICE AND STATUTE OF LIMITATIONS

When the SEC sought leave to serve under Rule 4(f) – stating "[r]ecently, we learned that Mr. Gottlieb may now be residing in Belgium" because he was supposedly

"associated with a firm in Antwerp" and had written a letter using that firm's letterhead – it suggested no time limitation and the court in its order imposed no limitation whatever. A 46, 49. Although at the time of its application (November 20, 1998), the SEC already had an affidavit from a Belgian process server dated five days earlier (November 15), it did not provide the affidavit to the court at that time (claiming it had to be translated), and the court nonetheless granted the motion without reviewing the affidavit. When the translated affidavit was delivered two weeks later, it turned out the process server had plainly been told – several months earlier, in August of 1998 – that Gottlieb no longer worked at the Belgian firm and in fact had left the country entirely. A 43. And when the process server returned to the same location in November 1998, just prior to the Rule 4(f) application, he reported that the person who answered the door stated that although Gottlieb used to work for the firm (which meant that he no longer did), she did not know him and had never even seen him. A 43.

It was therefore disingenuous and/or deceptive, for the SEC to state on November 20, 1998, that it had "recently" learned that Gottlieb "may now" be residing in Belgium, since it had actually learned that he had left Belgium at least several months earlier.

The following evidence substantiates that the lower court abused their authority when they wrote **New Law** by totally negating any reasonable interpretation of the restrictions imposed upon them by the legitimate interpretation of the Statute of Limitations. The lower court clearly and erroneously committed error by permitting the SEC unrestricted time to serve Gottlieb when the evidence was at their disposal, as outlined below:

1) The SEC physically had the correct information where Gottlieb resided and worked from the New York State Bar, even before the Statute of

Limitations lapsed but choose not to pursue it until 22 months after the Statute of Limitations lapsed.

2) Gottlieb was not in hiding! He lived openly with my wife and two children who attended grade school. One child has Downs Syndrome and could easily be traced as there are only two special schools in Nassau, Bahamas.

3) When Gottlieb moved to Nassau, Bahamas, he used Mayflower, the largest moving company in Florida.

4) Gottlieb was an active member of the Nassau Yacht Club.

5) Gottlieb was an active member of Rotary Club International and served on several voluntary committees.

6) Gottlieb served on the Board of Directors at the Nassau Jewish Congregation.

7) Gottlieb and his wife used American Express and MasterCard freely.

8) Gottlieb and his wife maintained United States Bank Accounts.

9) Gottlieb filed United States Tax Returns.

10) Gottlieb kept health insurance with Blue Cross and Blue Shield current and obtained out-of-country reimbursement and benefits for drugs and doctors.

11) Gottlieb kept a post office Box with Mail Boxes Etc. The SEC could have asked for Gottlieb's address at any time. The SEC stated that they mailed to Gottlieb's PO Box several times but they incredibly never undertook to find out Gottlieb's forwarding address.

12) Gottlieb lived in Florida and had an office in Florida for at least two months after the SEC filed its complaint. The SEC's own process server report

clearly shows that Gottlieb was not avoiding service (Gottlieb didn't even know about it) and could easily have been served during that period.

When the SEC requested more time, the lower court granted them 120 days additional time for Extraterritorial Service under Rule 4(f) (3), even though Gottlieb could have been found through ordinary means, particularly a U.S. Government Agency with all its vast resources.

The undisputed reality is that the SEC, failed to pursue Gottlieb diligently or timely. The lower court is not obligated to cover up or excuse the SEC from their sloppy work. The statute of limitations must be interpreted reasonably, consistent with its purpose. After all, no ordinary citizen would have been given these extraordinary time concessions had circumstances been reversed. Clearly the SEC was treated preferentially to Gottlieb's prejudice.

Regardless of the intent of the Statute of Limitations, and without consideration of the language of a Statute of Limitations, the lower court just keep extending the Statute of Limitations and extending it again and again and again, and finally they just granted the SEC all the time they wanted without any time limitations, restraints, or boundaries. To place these excessive extensions into a time frame and proper prospective, the Lower Court extending the Statute of Limitations beyond all reasonableness, a toothless tiger. To put the lengthy extensions into perspective, the court gave the SEC sufficient time, after the statutory allocated time to serve process, for two full term pregnancies, plus enough time left over for the first child born to have been registered in pre-school. It is evident that the lower court abused their discretion and negated the very reasons that Congress wrote a Statute of Limitations!

One is forced to ask, why bother having a Statute of Limitations if the Lower Court has no respect for the law. The SEC ONLY had to consult the information they already

had to locate where Gottlieb openly resided with his entire family. But the Lower Court covered up the SEC bungling, or non-existent attempts to serve Gottlieb and in their haste to assist the SEC have acted well beyond any statutory restraints and well beyond any previously decided discretionary boundaries and into the creation of New Law.

CONCLUSION

For the reasons set forth above, we respectfully request that this Honorable Court Grant a Writ of Certiorari, permitting a rehearing of the issues contained in the Summary Order of the Court of Appeals and the findings of the District Court.

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August 2, 2004

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NY 10007

[Date Stamp, Filed May 6, 2004]

ROSEANN B. MACKECIINIE
CLERK

Date: 4/28/04
Docket Number: 03-6035-cv
Short Title: SEC v. Stewart D(
Docket Number: 98-cv-2636
DC . SDNY (NEW YORK CITY)
DC Judge: Honorable Loretta Preska

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of May, two thousand four.

Present:

Hon. Dennis Jacobs
Hon. RobertD.Sack
Hon. Reena Raggi

CIRCUIT JUDGES..

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

ALLEN B. GOTTLIEB & LAW OFFICES OF GOTTLIEB AND ASSOCIATES, P.C, Relief defendant,

Defendants-Appellants,

GEORGE WALLACE STEWART, PATRICK I. MADDEN, KENNETH R. LAGONIA SALIM EL HAGE, H.D. INC. ST. BARTH LIMITED, EASTLAND AMERICAN BANK LIMITED, FOREIGN TRADE BANK INTERNATIONAL, MECIS INSURANCE AND REINSURANCE COMPANY, CORNEL D. PLEBANI, Relief Defendant, AMERICREDIT COMMERCIAL CORPORATION, Relief defendant, & FINANZURICH, LIMITED, Relief defendant,

Defendants

A petition for panel rehearing having been filed herein by Allen B. Gottlieb & Law Offices of Gottlieb and Associates, P.C.
Relief Defendant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED

For the Court,
Roseann B. MacKechnie, Clerk

By /S/
Arthur M. Heller
Motions Staff
Attorney

Lois M. Vitti Esq.
Gersten, Savage, Kaplowitz, , Wolf & Marcus
101 E. 52nd St.
New York, NY 10022

EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

[DATE STAMP-FILED MARCH 5, 2004]

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at: the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 5th day of March , two thousand four.

PRESENT: HON. DENNIS JACOBS,
HON. ROBERT D. SACK,
HON. REENA RAGGI,

Circuit Judges.

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SECURITIES EXCHANGE COMMISSION,

Plaintiff-Appellee,

-v-

03-6035

ALLEN B. GOTTLIEB & LAW OFFICES OF GOTTLIEB AND ASSOCIATES, P.C., Relief Defendant,

Defendants-Appellants,

GEORGE WALLACE STEWART; PATRICK S. MADDEN; KENNETH R.
LAGONIA; SALIM EL HAGE; H.D. INC.; ST. BARTH LIMITED: EASTLAND AMERICAN BANK LIMITED: FOREIGN TRADE BANK INTERNATIONAL; MECIS INSURANCE AND REINSURANCE COMPANY; CORNEL D. PLEBANI, Relief Defendant; AMERICREDIT COMMERCIAL CORPORATION, Relief Defendant; & FINANZURICH, LIMITED, Relief Defendant

Defendants.

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APPEARING FOR APPELLANT: ROBERT S. WOLF, Gersten, Savage, Kaplowitz, Wolf & Marcus, LLP, New York, NY

APPEARING FOR APPELLEE: MICHAEL L. POST, Securities and Exchange Commission, Washington, D.C.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be AFFIRMED.

Allen B. Gottlieb ("Gottlieb") appeals from a final judgment entered in the Southern District of New York (Preska, J.) for securities fraud in violation of § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) ("§17(a)"); and § 10 (b) of the, exchange Act or 1934, 15 U.S.C. § 78j(b) ("§ 10(b)"), and Rule 10b-5, 17 C.F.R.

§ 240.10b-S, promulgated thereunder. On appeal, Gottlieb argues (i) chat the 22 months it took the SEC co perfect service on him was excessive and impermissible under Federal Rule of Civil Procedure ("Rule") 12(b); and (ii) that the factual findings on which the judgment against him rests are clearly erroneous. We hold that Gottlieb has waived any insufficiency of service defense to the underlying civil enforcement action and affirm the judgment against him for substantially the reasons articulated by the district court. Familiarity is assumed as to the facts, procedural context, and specification of appellate issues.

1. The SEC's complaint was filed on April 14, 1998; Gottlieb was personally served in the Bahamas, pursuant to Rule 4(f), 22 months later, on February 4, 2000. Six months prior to trial (in June 2002), Gottlieb sought discovery as to the efforts undertaken by the SEC to comply with the 120 day time limit of Rule 4(m). The district court requested that Gottlieb and the SEC advise the court about deposition arrangements by joint letter no later than June 21, 2002. In that letter, the SEC took the position that Gottlieb's

objection to service was waived by his failure to assert the defense in his initial answer to the complaint, as required under Rule 12(h)(1). Gottlieb averred that he preserved the defense. On July 8, the district court ordered Gottlieb to answer the SEC's position on waiver no later than July 12. Gottlieb did not do so. He made no reference to service of process until the joint pretrial order, submitted December 9, 2002. One way or another, Gottlieb waived any insufficiency of service defense he might have had. Moreover, the district court did not abuse its discretion in deeming the service of process to have been timely effected pursuant to Rule 4(f), which specifies no specific time limit and appears to be subject to a flexible due-diligence standard. See Gleason V. McBride,, 869 F.2d 688, 691 (2d Cir. 1989).

2. Following a bench trial, we review the district court's findings of fact for clear error and its conclusions of law de novo. White v. White Rose Food, 237 F.3d 174, 166 (2d Cir. 2001). To establish a violation of 5 10(b) and Rule lob-S, the SEC was required to show that Gottlieb "(1) made a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities." SEC v. Monarch Funding Corn., 192 F.3d 295, 308 (2d Cir. 1999) (citing SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1467 (2d Cir.1996)).

"Essentially the same elements are required under Section 17(a) (1) - (3) [.]" Id.

Gottlieb was found liable in a "prime bank instrument" ("PBI") fraud, one of many such schemes in which investors are guaranteed fantastic returns on an obscure kind of transaction. The district court findings with respect to knowing, material misrepresentations are numerous: (i) Gottlieb claimed to be experienced in PBI

trading (no one is); (ii) Gottlieb asserted the PBI transactions were "riskless" and that any bank would be "crazy" not to take them; (iii) Gottlieb claimed PBIs could be traded (they cannot); (iv) the retainer agreements securing Gottlieb's services to get financing for the PBI investments were bogus and fraudulent; (v) the terms used in the agreements have "no meaning and no import in the international banking community"; and (vi) any banking professional (as Gottlieb held himself out to be) would know that the terms of the transactions were meaningless (crediting SEC expert testimony) . Taken together, these (among other) findings led the district court to conclude that "Gottlieb . . . employed a device or scheme or artifice to defraud premised on severa layers of material. misrepresentations and omissions. Gottlieb offers no basis for finding clear error; our own review of the record reveals none.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:

ROSEANN B. MACKECNIE,
CLERK

By: /S/
Lucille Carr, Deputy Clerk

DOC # 85

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	[File Stamp–January 21, 2003] USDC SDNY 1/21/03]
Plaintiff,	98 CIV. 2636(LAP)
v.	
George Wallace Stewart, et al.	
Defendants,	
-and-	
Cornel D. Plebani et al.,	
Relief Defendants.	

FINAL JUDGMENT AGAINST DEFENDANT ALLEN B. GOTTLIEB, AND RELIEF DEFENDANTS, AMERICREDIT COMMERCIAL CORPORATION, LAW OFFICES OF GOTTLIEB AND ASSOCIATES, P.C., AND FINANZURICH, LIMITED

The Court, having made its Findings of Fact and

Conclusions of Law concerning Defendant Allen B. Gottlieb and having found the Relief Defendants Americredit Commercial Corporation, Law Offices of Allen B. Gottlieb and Associates, P.C., and Finanzurich in default, based on the testimony of witnesses and evidence offered by the respective parties during a four day bench trial that commenced on December 9, 2002 and concluded on December 12, 2002, now enters its Final Judgment in favor of Plaintiff Securities and Exchange Commission against Defendant Allen B. Gottlieb and Relief Defendants Americredit Commercial Corporation, Law Offices of Gottlieb and Associates, P.C., and Finanzurich, Limited.

I.

IT IS HEREBY ORDERED, ADJUDGES AND DECREED that Defendant Gottlieb, his officers, agents, servants, employees, attorneys-in-fact, successors and assigns, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, be and hereby are permanently restrained and enjoined (as further . . .) from violating Section 10(b) of the Securities Exchange Act ("Exchange Act") [15 U.S.C. § 78*j*(b)] and Rule 10b-5 thereunder [17 C.F.R. § 241.10b-5] by, directly or indirectly, using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange:

(a) to employ any device, scheme or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in

connection with the purchase or sale of any security.

II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Gottlieb, his officers, agents, servants, employees, attorneys-in-fact, successors and assigns, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, be and hereby are permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77*q*(a)], by, directly or indirectly, in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, or of any facility of any national securities exchange:

(a) to employ any device, scheme or artifice to defraud; or

(b) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any transaction, act, practice, or course of business which operates or would operate as a fraus upon the purchaser.

III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Gottlieb pay disgorgement in the amount of $950,923.92, representing his gains from the conduct alleged in the Complaint, plus prejudgment interest thereon in the amount of $1,048,516.62, for a total amount of $2,005,443.54. The disgorgement figure reflects a credit of $811,076.00 received by Robert J. Longo in settlement of his civil action also heard by this Court; as well as a payment of

$7000.00 by Relief Defendant Cornel Plebani. To satisfy his obligation, Gottlieb shall make payment into the Registry of this Court, by cashier's check, certified check, or postal money order, made payable to "Clerk, United States District Court, Southern District of New York", under cover of a letter that identifies the Defendant and name and number of this action. At the same time payment is remitted, defendant Gottlieb shall send a photocopy of the check or monry order to the Secretary of the Commission at the following address:

Office of the Secretary
Securities and Exchange Commission
450, Fifth Street, Mail Stop 6-9
Washington, D.C. 20549-0609

The photocopy shall be accompanied by a letter that identifies Gottlieb as the defendant in this action, the civil action number assigned to the Complaint, the District Court in which the Complaint and this Final Judgment were filed, and the Commission's internal case number (HO-2833). Copies of all such letters to the Court and to the Secretary of the Commission shall be sent simultaneously to counsel of record for the Commission, Kathleen A. Ford, Esq., Assistant Chief Litigation Counsel, 450 Fifth Street, N.W., Mail Stop 9-11, Washington, D.C. 20459-0911. The payment shall be made within twenty days of receipt of the Final Judgment by counsel for defendant Gottlieb. The disgorged funds and prejudgment interest shall be held by the Registry of this Court in an interest bearing account pending further order of the Court.

IV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pending full payment by Defendant Gottlieb of the amount owed under this Final Judgment:

a. Defendant Gottlieb, as well as its agents, servants, employees, successors, attorneys-in-fact, and those persons in active concert or

participation with him who receive actual notice of this Final Judgment by personal service or otherwise, including by facsimile transmission or overnight delivery service, and each of them, shall continue to hold and retain within their direct or indirect control, and otherwise prevent any withdrawal, sale, transfer, alienation, pledge, encumbrance, assignment, dissipation, concealment, or other disposition whatsoever (with the exception of transferring assets to either the Registry of the Court or the U.S. Treasury) any funds or other assets of Defendant Gottlieb presently held by them (or which they accumulate after this Final Judgment), under their control, or over which they exercise actual or apparent investment or other authority (including signatory authority), in whatever form such assets may presently exist and wherever located;

b. any financial or brokerage institution or other person or entity holding any funds or other assets in the name, for the benefit, or under the direct or indirect control of Defendant Gottlieb and which receives actual notice of this Final Judgment by personal service or otherwise, including by facsimile transmission or overnight delivery service, and each of them, shall continue to hold and retain within its control and prohibit the withdrawal, removal, transfer, or other disposition of any such funds or other assets (with the exception of transferring assets to the Registry of the Court).

V.

IT IS FURTHER ORDERED that Defendant

Gottlieb is ordered to pay a civil monetary penalty pursuant to Section
20(d)(2)(C) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3)(B)(iii) of the Exchange Act [15 U.S.C. § 77u(d)], in the amount of $878,333. To satisfy this obligation, Gottlieb shall make payment to the Comptroller of the Securities and Exchange Commission, by cashier's check, certified check or postal money order, made payable to "Comptroller, United States Securities and Exchange Commission", accompanied by a letter explaining the money is made in satisfaction of the penalty portion of this judgment, and identifying Gottlieb as the defendant in this action, the name and civil action number of this action, the District Court in which the Complaint and Final Judgment were filed, and the Commission's internal case number (HO-2833). Payment shall be made to the following address:

Office of the Comptroller
United States Securities and Exchange Commission
450, Fifth Street, N.W., Mail Stop 0-3
Washington, D.C. 20549-0303

At the same time payment is remitted, defendant Gottlieb shall send a photocopy of his check or money order and correspondence to the Secretary of the Commission and to Mrs. Identified in paragraph III above. The payment shall be made within twenty days of receipt of the Final Judgment by counsel for defendant Gottlieb, and shall be forwarded by the Comptroller of the Securities and Exchange Commission to the United States Treasury.

VI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Gottlieb shall not make or cause to be made on his behalf any claim against any disgorgement fund created from assets disgorged by, or otherwise obtained from, any of the Defendants or Relief Defendants in this action, for distribution to investors who suffer or have

suffered losses from the offer and sale of securities by any of the Defendants as alleged in this action.

VII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that thjis Court shall retain jurisdiction over Defendant Gottlieb as a party to this matter for all purposes including implementation and enforcement of the terms and conditions of this Final Judgment and discovery.

VIII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Relief Defendants pay disgorgement for their ill-gotten gains as follows: Americredit Commercial Corporation, $353,000 plus prejudgment interest thereon of $397,276.72, for a total of $750,276.72; Law Offices of Gottlieb and Associates, P.C., $150,000 plus prejudgment interest thereon of $168,814.49, for a total of $318,814.49; and Finanzurich, Limited, $350,000 plus prejudgment interest thereon of $393,900.366 for a total of $743,900.46. To satisfy this disgorgement obligation, the Relief Defendants shall make payment into the Registry of this Court, by cashier's check, certified check, or postal money order, made payable to "Clerk, United States District Court", under cover of a letter that identifies the Relief Defendant, and the name and number of this action. At the same time payment is remitted, defendant Gottlieb shall send a photocopy of the check or money order to Secretary of the Commission at the following address:

Office of the Secretary
Securities and Exchange Commission
450, Fifth Street, Mail Stop 6-9
Washington, D.C. 20549-0609

The photocopy shall be accompanied by a letter that identifies Gottlieb as the defendant in this action, the civil action number assigned to the Complaint, the District Court in which the Complaint and this Final Judgment were filed, and Commission's internal case number (HO-2833). Copies

of all such letters to the Court and to the Secretary of the Commission shall be sent simultaneously to counsel of record for the Commission, Kathleen A. Ford, Esq., Assistant Chief Litigation Counsel, 450 Fifth Street, N.W., Mail Stop 9-11, Washington, D.C. 20459-0911. The disgorgement payment shall be made within thirty days of entry of this judgment. The disgorged funds and prejudgment interest shall be held by the Registry of this Court in an interest bearing account pending further order of the Court. The foregoing payments may be reduced to the extent the relief defendants can, and demonstrate that they may payments in support of the settlement in the Longo civil action, and by any payments made by defendant Gottlieb in connection with this Final Judgment.

IX.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pending full payment by the relief defendants of the amounts owed under this Final Judgment:

a. The relief defendants, as well as its agents, servants, employees, successors, attorneys-in-fact, and those persons in active concert or participation with him who receive actual notice of this Final Judgment by personal service or otherwise, including by facsimile transmission or overnight delivery service, and each of them, shall continue to hold and retain within their direct or indirect control, and otherwise prevent any withdrawal, sale, transfer, alienation, pledge, encumbrance, assignment, dissipation, concealment, or other disposition whatsoever (with the exception of transferring assets to either the Registry of the Court or the U.S. Treasury) any funds or other assets of the relief defendants presently held by them (or which they accumulate after this Final Judgment), under their control, or over

which they exercise actual or apparent investment or other authority (including signatory authority), in whatever form such assets may presently exist and wherever located;

b. any financial or brokerage institution or other person or entity holding any funds or other assets in the name, for the benefit, or under the direct or indirect control of the relief defendants and which receives actual notice of this Final Judgment by personal service or otherwise, including by facsimile transmission or overnight delivery service, and each of them, shall continue to hold and retain within its control and prohibit the withdrawal, removal, transfer, or other disposition of any such funds or other assets (with the exception of transferring assets to the Registry of the Court).

X.

There being no just reason for delay, the Clerk of the Court is directed, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, to enter this Final Judgment forthwith.

DONE AND ORDERED at New York, New York, this 15th day of January, 2003.

/s/ Loretta A. Preska
Honorable Loretta A. Preska
United States District Judge

THIS DOCUMENT WAS ENTERED ON THE

A-17

DOCKET ON 1/23/03